

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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RAYMON SELLERS,

Plaintiff,

v.

DERRICK STEVENS dba STAGECOACH
RESTAURANT; JIN R. WONG; WONDA
Y. WONG; JANICE WONG; and JANET
WONG,

Defendants.

No. 2:20-cv-01787 WBS AC

MEMORANDUM AND ORDER RE:
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT

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Plaintiff moves for summary judgment against all defendants¹ in this disability access action under (1) the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101; (2) the Unruh Civil Rights Act ("Unruh Act"), California Civil Code §§ 51-53; and (3) denial of full and equal access to public

¹ Plaintiff's motion also seeks default judgment against Derrick Stevens. The clerk's office has already his default. (Docket No. 47.) Plaintiff may file his motion for default judgment against Stevens with the assigned magistrate judge as required by Local Rule 302(c)(19).

1 facilities, California Health & Safety Code § 19955.² (Second
2 Am. Compl. ("SAC") (Docket No. 36).)

3 I. Factual and Procedural Background

4 Plaintiff is a C5 quadriplegic who cannot walk and uses
5 a power wheelchair for mobility. (Defs.' Resp. to Pl.'s
6 Statement of Facts ("PSUF") at ¶ 1 (Docket no. 51-1).)
7 Stagecoach Restaurant ("Stagecoach"), constructed in 1968, is a
8 public accommodation located at 4365 Florin Road, Sacramento,
9 California. (Id. ¶ 2; Pl.'s Resp. to Defs.' Statement of Facts
10 ("DSUF") ¶ 90 (Docket no. 52-1).) Defendants Jin R. Wong, Wonda
11 Y. Wong, Janice Wong, and Janet Wong own the real property on
12 which Stagecoach is located, and lease it to defendant Derrick
13 Stevens who operates Stagecoach. (PSUF ¶¶ 3-4.)

14 Plaintiff visited Stagecoach on May 31, 2020, and it
15 was open to the public for take-out orders only. (Id. ¶ 7.) The
16 main entrance of Stagecoach is not accessible because there is no
17 ramp. (Id. ¶ 8.) There is a designated accessible parking space
18 behind Stagecoach with a curb ramp to the sidewalk that leads to
19 a rear entrance. (Id. ¶ 9.) On May 31, 2020, the rear entrance
20 was locked. (Id.) Plaintiff contends he was unable to place a
21 take-out order on May 31, 2020 because he could not access the
22 restaurant and there was no signage telling him how to place an
23 order. (Id. ¶ 10.) Defendants contend that there was signage
24 indicating that a take-out order could be placed by phone and
25

26 ² Neither side's briefing makes any mention of
27 plaintiff's third claim under the Health and Safety Code.
28 Therefore, the court will not rule on plaintiff's third claim in
this order.

1 would be delivered to the vehicle. (Id.)

2 Plaintiff again visited Stagecoach on August 21, 2020
3 with a friend and it was open to the public for take-out orders
4 and outdoor dining. (Id. ¶¶ 11-12.) Plaintiff contends he
5 wanted to dine on the outdoor patio but could not access it or
6 the hostess table at the main entrance due to the lack of a curb
7 cut. (Id. ¶¶ 12-13.) However, plaintiff does not dispute that
8 the route leading from the accessible parking space to the rear
9 entrance also leads to the gated outdoor patio dining area.

10 (DSUF ¶ 91.) Plaintiff's friend got out of the vehicle and
11 ordered food to go. (Decl. of Raymon Sellers ¶ 8 (Docket No. 48-
12 2).) Plaintiff contends he continues to order food from
13 Stagecoach at least twice a month but sends others to pick it up
14 for him. (PSUF ¶ 15.)

15 Plaintiff filed his initial complaint in this action on
16 September 30, 2020. (Docket No. 1.) After the filing of
17 plaintiff's complaint, defendants renovated the inside and
18 outside of the property in 2021, including the parking lot,
19 dining counter, and restrooms. (PSUF ¶¶ 22-26.)

20 Plaintiff's expert, Michael Bluhm, visited the
21 restaurant on January 20, 2021 and November 3, 2021. (Decl. of
22 Michael Bluhm ¶ 3 (Docket No. 48-4).) Defendants' expert, Craig
23 Lobnow, visited Stagecoach on June 30, 2022. (DSUF ¶ 94.)

24 Plaintiff seeks in this motion injunctive relief under
25 the ADA for barriers he encountered and additional barriers he
26 has learned of during the pendency of this action, which are
27 described below, and statutory damages under the Unruh Act.

1 I. ADA Liability³

2 A. Accessible Entrance

3 Plaintiff acknowledges that the front entrance of
4 Stagecoach is not accessible pursuant to the ADA Accessibility
5 Guidelines ("ADAAG"), and it is likely not readily achievable to
6 make it accessible. (Pl.'s Mem. ISO Mot. ("Pl.'s Mot.") at 12
7 (Docket No. 48-1).) The rear entrance to the restaurant is the
8 designated accessible entrance and has a gate outside of it.
9 Plaintiff seeks an injunction requiring defendants to: "(1) keep
10 the rear gate propped open at all times during business hours[;]
11 (2) keep the designated accessible rear entrance unlocked and
12 available for use during business hours[;]" and (3) if weather
13 conditions "prevent the rear entrance from being opened by
14 customers," . . . "defendants [shall] install a doorbell or two-
15 way communication device at the rear door for customers to summon
16 Stagecoach staff to open the door for them." (Id. at 13.)

17 Plaintiff's expert has submitted photos of the rear
18 entrance area taken during the expert's two visits to Stagecoach.
19 (Decl. of Bluhm, Exs. C-F.) The photographs show the rear gate
20 in an open position. (Id., Ex. D.) A sign in all-caps is posted

21 ³ Plaintiff did not personally encounter all of the
22 alleged barriers. Nevertheless, the Ninth Circuit allows "[a]n
23 ADA plaintiff who has standing as a result of at least one
24 barrier . . . [to] challenge all barriers in that public
25 accommodation that are related to his or her specific
26 disability." Doran v. 7-Eleven, 524 F.3d 1034, 1047 (9th Cir.
27 2008). Here, plaintiff personally encountered the alleged
28 barriers in accessing the entrance and the outdoor patio dining
area on May 31, 2020 and August 21, 2020. The other alleged
barriers relate to plaintiff's quadriplegic status. Accordingly,
plaintiff also has standing to challenge these other barriers
under the ADA.

1 by the rear gate which reads: "Due to COVID-19 gate is locked!
2 For handicap entrance please call (916) 422-9296 and we will
3 assist you immediately!" (Id., Ex. E.) There are also signs on
4 the rear door, which comes after entering the rear gate, that
5 state: "Due to windy conditions please use front door," "please
6 check in at the front counter to be seated," and that take-out is
7 available from 7am-3pm daily and the number to call to place an
8 order. (Id., Exs. E-F.)

9 Defendants' expert has submitted photos taken on June
10 30, 2022 which again show the rear gate in an open position.
11 (Decl. of Craig Lobnow, Ex. 1 ("Lobnow Evaluation"), at 2-3, 19,
12 22 (Docket No. 51-4).) The photos also appear to show the sign
13 about calling Stagecoach for the "handicap entrance" to still be
14 in place. (Id. at 2.)

15 The only photos submitted by plaintiff which show the
16 rear gate in a locked position were taken in August 2020, and
17 were not taken by plaintiff during either of his visits to
18 Stagecoach. (Decl. of Sellers, Exs. D, E; id. ¶¶ 11-12.)
19 However, there is no indication that Stagecoach was open for
20 business at the time these photographs were taken as all the
21 doors and gates are closed and there are no cars in the parking
22 lot. The photo angles also do not show the rear entrance door
23 beyond the rear gate, and therefore, the court cannot determine
24 if there is any sign posted about calling for take-out orders or
25 access.

26 The evidence submitted by the parties shows the rear
27 gate, which leads to the rear accessible entrance, in an unlocked
28 position on multiple occasions, including as recent as June 30,

2022. Plaintiff presents no evidence that the rear gate or entrance is locked during business hours. Further, plaintiff presents no evidence about the need for a "doorbell or two-way communication system" as there is a sign stating the number customers can call for the "handicap entrance."

Based on the evidence submitted by both parties, it is disputed whether the rear gate and entrance were unlocked, and if the above-described signs were posted at the time of plaintiff's two visits. There is a genuine dispute of material fact as to whether the accessible entrance needs to be "maintained" in a usable manner as plaintiff's injunctive relief requests. See 28 C.F.R., pt. 36, App. C § 36.211 ("[a] public accommodation shall maintain in operable working condition those features of facilities . . . that are required to be readily accessible to and usable by persons with disabilities").

Accordingly, plaintiff's motion for summary judgment on the ADA claim for an accessible entrance will be denied.

B. Slopes within Designated Accessible Parking

The ADAAG require that floor or ground surfaces of the parking space and access aisle must not include slopes steeper than 1:48 (approximately 2.0 percent). 36 C.F.R., pt. 1191, App. D § 502.4.⁴ After renovations of the parking lot were complete at Stagecoach, plaintiff's expert measured slopes within the designated accessible parking space and aisle up to 5.5 percent. (Decl. of Bluhm ¶ 16; id., Ex. G.) Defendants' expert measured

⁴ Plaintiff cites to the 1991 ADAAG which state the slope cannot be more than 1:50 (exactly 2.0 percent). See 28 C.F.R., pt. 36, App. D § 4.6.3.

1 slopes not greater than 2.0 percent in the designated accessible
2 parking space and aisle. (Lobnow Evaluation at 4-16; Decl. of
3 Craig Lobnow ¶ 12 (Docket No. 51-3).)

4 There is a genuine dispute of material fact whether the
5 designated accessible parking space and aisle have slope levels
6 compliant with the ADAAG. Accordingly, plaintiff's motion for
7 summary judgment on the ADA claim for accessible parking will be
8 denied.

9 C. Accessible Route from Public Sidewalk

10 Pursuant to the ADAAG, "[a]tleast one accessible route
11 shall be provided within the site from . . . public streets and
12 sidewalks." 36 C.F.R., pt. 1191, App. B § 206.2.1. Plaintiff
13 argues that there is a "somewhat accessible path of travel to the
14 front entry walkway" but that it is not compliant with the ADAAG
15 in several ways (excessive slopes, large openings within the
16 walking surface, no kick plate, and a closed front gate). (Pl.'s
17 Mot. at 14.) Defendants' expert acknowledges that there is no
18 accessible path of travel from the public sidewalk. (Decl. of
19 Lobnow ¶ 9.) Therefore, the next inquiry is whether removing
20 this barrier is "readily achievable." See 42 U.S.C. §
21 12182(b)(2)(A)(iv).

22 The ADA sets out four factors to be considered in
23 determining whether removal of a barrier is "readily achievable":

24 "(A) the nature and cost of the action needed
25 under this chapter;

26 (B) the overall financial resources of the
27 facility or facilities involved in the action;
28 the number of persons employed at such facility;
the effect on expenses and resources, or the

1 impact otherwise of such action upon the
2 operation of the facility;

3 (C) the overall financial resources of the
4 covered entity; the overall size of the business
5 of a covered entity with respect to the number of
6 its employees; the number, type, and location of
7 its facilities; and

8 (D) the type of operation or operations of the
9 covered entity, including the composition,
10 structure, and functions of the workforce of such
11 entity; the geographic separateness,
12 administrative or fiscal relationship of the
13 facility or facilities in question to the covered
14 entity."

15 42 U.S.C. § 12181(9)(A)-(D). Notably, the four-factor test set
16 forth by the ADA inevitably is a question of fact which requires
17 a showing of evidence.

18 An ADA plaintiff bears the initial burden of "plausibly
19 showing how removal of an architectural barrier is readily
20 achievable under the circumstances." Lopez v. Catalina Channel
21 Express, Inc., 974 F.3d 1030, 1035-36 (9th Cir. 2020). "Only if
22 the plaintiff first makes a plausible showing that the barrier
23 removal is readily achievable, does the defendant then have to
24 negate the showing and prove that removal is not readily
25 achievable." Id. at 1036 (emphasis in original).

26 Here, plaintiff does not plausibly show that an
27 accessible route is readily achievable. Plaintiff's expert
28 concluded that filling in gaps in the front walkway would cost
\$50. (PSUF ¶ 47.) However, a response to plaintiff's claim
would also require the renovation of the parking lot, the front
entry walkway, the front gate, and the dining patio. Plaintiff

1 presents no evidence of the costs of the totality of these
2 renovations. Nor does plaintiff provide any evidence of
3 defendants' financial resources or the nature of defendants'
4 business. (See Pl.'s Mot. at 14.)

5 Even if plaintiff met his initial burden, defendants'
6 expert concludes that an accessible route from the sidewalk is
7 not possible because "[g]iven the ground conditions, the entire
8 lot would have to be regraded with extensive ramping and terrain
9 alteration in order to eliminate the changes in elevation" -
10 making the renovations not readily achievable. (Decl. of Lobnow
11 ¶ 9)

12 Therefore, because plaintiff has not met his burden of
13 establishing an essential element of his ADA claim for an
14 accessible route from the public sidewalk plaintiff's motion for
15 summary judgment on this part of the ADA claim will be denied.

16 D. Slopes and Height Changes at Accessible Entrance

17 Under the ADAAG, "required maneuvering clearances" at
18 doorways, changes in level of the floor or ground surface are not
19 permitted.⁵ 36 C.F.R., pt. 1191, App. D § 404.2.4.4.
20 Plaintiff's expert measured slopes of up to 3.4 percent at the
21 exterior side of the designated accessible entrance. (Decl. of
22 Bluhm ¶ 19; id., Ex. I.) Defendants do not dispute this fact and
23 instead state that "the entry has a path of travel with a maximum
24 5.0 [percent] slope allowance." (PSUF ¶ 37; DSUF ¶ 107.)

25 Plaintiff's expert also found that a floor mat at the
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27 ⁵ Plaintiff cites to the 1991 ADAAG which contain the
28 same requirement. See 28 C.F.R., pt. 36, App. D § 4.13.6.

1 interior side of the designated accessible entrance creates a
2 vertical height change of more than 1/4 inch. (Decl. of Bluhm ¶
3 22.) Defendants argue that the floor mat was moved slightly to
4 cover the threshold of the entrance during plaintiff's expert's
5 inspection. (DSUF ¶ 109; Defs.' Opp'n at 2 (Docket No. 51).)
6 However, plaintiff does not argue that the threshold of the
7 doorway entrance is too high, rather that there is an excessive
8 height change within the maneuvering clearances at the designated
9 accessible entrance.

10 There is no genuine dispute of material fact as to the
11 excessive slopes and height changes within the maneuvering
12 clearances at the designated accessible entrance. Plaintiff has
13 proven that defendants failed to comply with the ADA requirement
14 that there be no changes in level of the floor or ground surface
15 within the maneuvering clearances at doorways.

16 Again, however, plaintiff bears the initial burden of
17 "plausibly showing how removal of an architectural barrier is
18 readily achievable under the circumstances." Lopez, 974 F.3d at
19 1035-36. Plaintiff's expert opines that grinding the pavement
20 would cost between \$300 to \$500 and replacing the landing would
21 be \$1,000. (PSUF ¶ 39.) However, plaintiff presents no further
22 evidence concerning the other readily achievable factors that the
23 ADA requires to be considered such as the overall financial
24 resources or the effect on expenses and resources. See 42
25 U.S.C. § 12181(9)(A)-(D). Therefore, plaintiff has not met his
26 initial burden.

27 Accordingly, the court will deny summary judgment for
28 plaintiff on the ADA claim for the excessive slope and height

1 changes within the maneuvering clearances at the designated
2 accessible entrance because plaintiff has failed to prove an
3 essential element of his claim.

4 E. Seating Spaces

5 Plaintiff argues that the dining counter within
6 Stagecoach is only 38 inches in length and is required to be 60
7 inches in length. (PSUF ¶ 51.) For this requirement, plaintiff
8 cites to the 1991 ADAAG, not the 2010 ADAAG. (See Pl.'s Mot. at
9 14 (citing 28 C.F.R., pt. 36, App. D § 5.2).) There is no such
10 requirement in the 2010 ADAAG. See 36 C.F.R., pt. 1191, App. D §
11 902.

12 The Department of Justice promulgated the ADAAG
13 in 1991 and revised it in 2010. See Kohler v. Flava Enters.,
14 Inc., 826 F. Supp. 2d 1221, 1229 (S.D. Cal. 2011). All
15 architectural and structural elements in a facility are required
16 to comply with the 1991 ADAAG to the extent that compliance is
17 readily achievable; by contrast, the 2010 ADAAG apply only to
18 elements that have been altered in existing facilities, or that
19 fail to comply with the 1991 ADAAG, on or after March 15, 2012.
20 28 C.F.R. § 36.304(d)(1)-(2). Plaintiff admits that the dining
21 counter was altered in 2021. (PSUF ¶ 25.) Therefore, it is
22 subject to the 2010 ADAAG.

23 Because the 2010 ADAAG do not contain a requirement
24 that the dining counter be 60 inches in length, there is no ADA
25 violation. Accordingly, plaintiff's motion for summary judgment
26 on the ADA claim for the dining counter will be denied.

27 Plaintiff also argues that there are not enough
28 accessible table seating spaces at Stagecoach. The ADAAG require

1 that 5.0 percent of seating spaces at Stagecoach be accessible.
2 See 36 C.F.R., pt. 1191, App. B § 226.1. Plaintiff's expert
3 contends that Stagecoach only has one of four required accessible
4 tables and that the following tables need to be added: two in the
5 main dining area, one in the outdoor patio, and one in the rear
6 dining area. (Decl. of Bluhm ¶¶ 33-37.) In contrast,
7 defendants' expert contends that there are 21 total tables at
8 Stagecoach in "three functional areas" of the restaurant, and
9 that there is an accessible table in each area, which meets the 5
10 percent requirement. (Decl. of Lobnow ¶¶ 26-28; Lobnow
11 Evaluation at 24-26.)

12 The experts dispute whether the number of accessible
13 tables in Stagecoach is sufficient under the ADA, and therefore,
14 there is a genuine dispute of fact. Accordingly, plaintiff's
15 motion for summary judgment on the ADA claim for the amount of
16 seating spaces will be denied.

17 F. Restroom

18 Plaintiff lists a number of alleged violations present
19 in the restroom at Stagecoach: (1) insufficient clear width of
20 the doorway opening; (2) door lock that requires tight grasping,
21 pinching, and/or twisting; (3) insufficient turning space; (4)
22 improperly positioned toilet and flush control; (5) improperly
23 positioned toilet paper dispenser; (6) improperly positioned grab
24 bars; (7) insufficient knee and toe clearances under the
25 lavatory; (8) improper height of light switch; and (9) improper
26 height of mirror. (Pl.'s Mot. at 16-19.) Defendants do not
27 dispute that these ADA violations exist in the restroom. (See
28 PSUF ¶¶ 59-83.)

1 In response, defendants merely note that as of the date
2 of their expert's visit to Stagecoach, June 30, 2022, there was
3 no restroom open to the public. (Lobnow Evaluation at 27.) The
4 restroom at Stagecoach was completely renovated in 2021, and
5 defendants present no explanation regarding why the restroom was
6 closed on June 30, 2022. (See PSUF ¶ 26.)

7 Even if the restroom is not open to the public,
8 plaintiff's ADA claim for the restroom is not necessarily mooted.
9 Injunctive relief is the only form of relief available in a
10 private action for violation of the ADA's Title III, and
11 therefore a "defendant's voluntary removal of alleged barriers
12 prior to trial can have the effect of mootng a plaintiff's ADA
13 claim." Oliver v. Ralphs Grocery Co., 654 F.3d 903, 905 (9th
14 Cir. 2011). However, if the ADA violation could "reasonably be
15 expected to recur" then the claim is not moot. Friends of the
16 Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167,
17 190 (2000).

18 Defendants present no evidence that the restroom will
19 remain closed. Accordingly, the court must conclude that the ADA
20 violations are likely to recur because defendants simply can
21 unlock the restroom door and open it to the public again.

22 However, once again, plaintiff carries the initial
23 burden of plausibly demonstrating that removal of the barriers is
24 readily achievable. See Lopez, 974 F.3d at 1035-36. Plaintiff
25 presents not even an iota of evidence to meet this burden with
26 respect to the restroom violations. Despite sending an expert to
27 examine every inch of Stagecoach in order to find additional
28 barriers, plaintiff does not provide the court with any evidence

1 whatsoever of the readily achievable factors through his expert.
2 See 42 U.S.C. § 12181(9) (A) – (D).

3 Plaintiff appears to assume that just because
4 defendants were able to renovate portions of the restroom in 2021
5 that it is readily achievable for defendants to remove all
6 barriers in the restroom now. If plaintiff wanted the court to
7 take this motion seriously, he could have given the court some
8 tangible evidence beyond bald unsupported assumptions.

9 Accordingly, plaintiff's motion for summary judgment
10 for the ADA claim for the restroom will be denied.

11 III. Unruh Act


12 The Unruh Act provides in relevant part that every
13 person is "entitled to the full and equal accommodations,
14 advantages, privileges, or services in all business
15 establishments of every kind whatsoever" notwithstanding his or
16 her disability. Cal. Civ. Code § 51(b). "A violation of the
17 right of any individual under the federal Americans with
18 Disabilities Act of 1990 shall also constitute a violation of
19 [the Unruh Act]." Cal. Civ. Code § 51(f) (internal citations
20 omitted).

21 Plaintiff does not allege a violation of the Unruh Act
22 independent from his claims under the ADA. (SAC ¶¶ 38-39.) As
23 discussed above, the court will not grant summary judgment on any
24 of the alleged ADA violations. Therefore, the court will not
25 grant summary judgment for plaintiff on his Unruh Act claim based
26 on the alleged ADA violations.

27 IT IS THEREFORE ORDERED that plaintiff's motion for
28 summary judgment (Docket No. 48) be, and the same hereby is,

1 DENIED without prejudice to re-filing the motion after further
2 discovery.

3 Dated: August 4, 2022



4 **WILLIAM B. SHUBB**

5 **UNITED STATES DISTRICT JUDGE**
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